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LIMITATION PERIODS ON PERSONAL INJURY CLAIMS

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Most jurisdictions restrict the time within which an action for damages may be brought to compensate a plaintiff for a personal injury.[1] Furthermore, it is noteworthy that limitation periods applicable to personal injury claims tend to be relatively short.[2] Often the time allotted for the bringing of such an action is only two or three years.

There are several policy reasons for retention of a limitation period preventing actions from being brought to recover damages for personal injuries except within the specified period:

(1) It is generally thought improper to subject a person indefinitely to the possibility of being found liable to pay damages. It is often thought that a stale claim may have more injustice than justice in it. However, where a plaintiff is aware that he has a claim he may wish to wait as long as he possibly can so that all the items in his claim may be accurately evaluated and so that he may claim the full amount of damages under each head.

(2) Most actions for personal injuries depend to a great extent upon the testimony of witnesses, and the recollection of such witnesses inevitably becomes less credible. After a lapse of time witnesses may exhibit one of two tendencies. They may either admit that their memory has faded or they may become more assertive as to a sequence of events which may or may not correspond with the truth.

(3) Other evidence tends to disappear. Since the burden of proof on a balance of probabilities is, in a civil action, upon the plaintiff this disappearance of evidence may render him less easily able to succeed.

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1 All common law and civil law systems have such periods. The problems are factual ones presented in all societies. *See generally* J. ANGELL, LIMITATIONS OF ACTIONS AT LAW 503 (6th ed. 1876); McLaren, *The Impact of Limitation Periods on Actionability in Negligence* 7 ALBERTA L. REV. 247 (1968).

2 The fact that the limitation periods for personal injury claims are short causes two problems to be raised. The first is that the limitation period may have run before the cause of action is discovered. This is the problem raised in Note, *Malpractice and the Statute of Limitations* 32 IND. L.J. 528 (1957). The second is that the plaintiff may attempt to correct errors, such as the substitution of the proper defendant in the action, after the time has elapsed. In *Ryser v. Gatchel*, 278 N.E.2d 320 (Ind. App. 1972) the Indiana Court of Appeals allowed a summary judgment to be upset where the plaintiff was apparently intentionally misled as to who was the appropriate defendant in the action. Hoffman, C. J., in delivering the opinion of the court, said:

> This case has necessitated that this court draw a very fine line. On one hand, we must be extremely careful to insure that the summary judgment proceeding has not erroneously deprived the plaintiff of her day in court. On the other hand, we must be equally as careful not to prejudice defendant's case by depriving him of his right to the affirmative defense accorded by statute, i.e., the running of the statute of limitations. 278 N.E.2d at 324.

In an action for recovery of damages for personal injuries, the claim is likely to be founded in either trespass or negligence.[3] While the former tort depends upon the occurrence of a direct invasion of bodily security committed in a manner that indicates an intention to perpetrate such an invasion,[4] negligence consists of the breach of a duty of care which results in proximate damage to the plaintiff.[5] In either case the gist of the action is damage. When the damage is in fact suffered there is then no remaining impediment to a successful suit.[6] It is well recognized that when the last of all the elements of a tort necessary for the successful maintenance of an action occurs the cause of action is said to have accrued.[7] In the tort actions now being contemplated the last such element is almost always the occurrence of the damage and if there exists at that time no legal disability on the part of the plaintiff then the cause of action may be said to have accrued and the time limited by the statute begins to run. The appropriate time period in Indiana is two years.[8] This time period may thus be said to run inexorably from the time of the accrual of the cause of action. The common law position is that the limitation period runs from the time of the accrual of the cause of action unless a legal disability exists at that time.[9] If the plaintiff is suffering from a disability at the time of accrual of the cause of action the limitation period is extended.[10]

One difficulty which has emerged is that sometimes at the time of accrual of the cause of action the potential plaintiff may not know that he is injured. Quite clearly in all the usual cases he will be aware that he has been injured. However, there are several forms of imperceptible disease and disability of which an ordinarily prudent person may well be unaware. In the case of such afflictions it may well be that the ordinary person would not know that he had an injury, and therefore that he had a cause of action within the two year limitation period. The result of the statute may thus be to deprive an individual of his action before he even knows he has one, although that individual has been as careful with respect to his health as might reasonably be expected. A statute

3 These are the torts under which physical damage to the person is most commonly claimed. Although in malpractice cases it has been suggested that the action for breach of contract might be the appropriate remedy, most courts characterize this as a claim sounding in tort. *See* Cappuci v. Barone, 226 Mass. 578, 165 N.E. 653 (1919) (fraudulent concealment) and Weinstein v. Blanchard, 162 A. 601 (N.J. 1932).

4 Injury resulting directly from the trespassory act and an apparent intention on the part of the actor are the hallmarks of the trespassory torts.

5 "Actual loss or damage" is the fourth element of a cause of action in negligence. The late Professor Prosser states that, "It follows that the statute of limitations does not begin to run against a negligence action until some damage has occurred." W. PROSSER, THE LAW OF TORTS 144 (4th ed. 1971); *see also* note 7 *infra*.

6 There may be defenses available to counter the bringing of such a suit. However, when all the elements of the tort concur, a prima facie case may be made out. At that time a cause of action accrues subject to any relevant defenses.

7 Merritt v. Economy Dept. Store, 125 Ind. App. 560, 128 N.E.2d 279 (1955) and Wabash County v. Pearson, 120 Ind. 426, 22 N.E. 134 (1889).

8 *See* IND. CODE, 34-1-2-2 (1971); IND. ANN. STAT. § 2-602 cl. 1 (1967). It is noteworthy that an English limitation period very similar to the Indiana provision was decried as unfair by the House of Lords in Cartledge v. Jopling [1963] A.C. 458.

9 Legal disabilities came to be statutorily recognized at an early date. *See* J. ANGELL, LIMITATIONS OF ACTIONS AT LAW 201 (6th ed. 1876).

10 *E.g.*, IND. CODE, 34-1-2-5 (1971); IND. ANN. STAT. § 2-605 (1967).

of limitations may thus create a hardship on a plaintiff who is deprived of his chance to recover his loss through no fault of his own. It is suggested that a hardship of this sort might be expected in two circumstances:

(1) Where because of the nature of the disease or disability, tortiously inflicted symptoms of it are very difficult to discover within the limitation period. Examples may be silicosis, cancer or damage caused by exposure to radioactive matter.
(2) Where because of the circumstances surrounding the infliction of the harm it is difficult for the plaintiff to discover the injury. Examples may be malpractice of doctors and dentists.[11]

In either case the existence of the injury may be obscured so as to be concealed to a person displaying ordinary care. It is this feature of the strict application of the limitation period that has induced courts to be solicitous to plaintiffs. Although there may exist in particular circumstances an extension of the limitation period because of fraud or disability, the time period limitation normally runs without an interruption. In Indiana the running of time may also be postponed where a defendant conceals from a plaintiff the existence of a cause of action against him.[12] Such a provision might seem to be applicable in the cases of medical malpractice referred to above, but the provision would not extend the limitation period applicable to the person who had not discovered his affliction where it was one which naturally was not susceptible to an early discovery, no matter how reasonably he had acted. However, even the use of the extension of the time period for concealment appears to be precluded by another explicit statutory section.[13]

> No action of any kind for damages, whether brought in contract or tort, based upon professional services rendered or which should have been rendered, shall be brought, commenced or maintained, in any of the courts of this state against physicians, dentists, surgeons, hospitals, sanitariums or others, unless said action is filed within two [2] years from the date of the act, omission or neglect complained of.

This leaves unaltered the position in both of the circumstances mentioned above in which a plaintiff may be prejudiced by an unexpected injury and the automatic running of the limitation period. However, it is noteworthy that the accrual of the cause of action does not always coincide with the act or omission complained of, for the last element necessary to sustain an action in negligence is always the damage resulting from such act or omission.

The courts have attempted to evade the strict application of the limitation period. The attempt to be solicitous towards plaintiffs has the automatic con-

11 See the comments on this subject in Note, *Malpractice and the Statute of Limitations* 32 IND. L. J. 528 (1957). The malpractice of other professionals, such as attorneys, may fall within the same reasoning.

12 IND. CODE, 34-1-2-9 (1971); IND. ANN. STAT. § 2-609 (1967).

13 IND. CODE, 34-4-19-1 (1971); IND. ANN. STAT. § 2-627 (1967). It would appear that the introduction of this statute was prompted by a desire to provide a period which was easily measurable both with respect to commencement and to termination.

sequence of exposing the defendant in the suit to an action for a longer period of time than he otherwise might be. It is suggested that the courts tend to overlook the justice of the rule as between the plaintiff and defendant and look solely at the position of the plaintiff. Whereas a plaintiff whose claim is not effectively barred by a statute will naturally only bring his action if he is in a position to offer some proof of it, the action may be brought against the defendant quite regardless of whether he is in a position adequately to defend himself. A defendant who does not imagine that any claim may be brought against him is not only likely to have parted with evidence that he at one time had but is also likely to have lost track of evidence which at one time he could have obtained. The limitation period exists in part so that there shall not be imposed on potential defendants the procedural duty of keeping records indefinitely. It is suggested that this aspect of the reopening of the limitation period can work in favor of plaintiffs but cannot work in favor of defendants. For the foregoing reasons it is suggested that although the interposition by the courts of doctrines such as those of "continuing negligence" and "discovery" may be beneficial in the individual cases to which they have been applied, they do have a harmful effect upon the law by distorting it. It is suggested that a more rational codification of the circumstances in which the running of time will be suspended is requisite in order to avoid further violence to legal principle. Such a measure would relieve plaintiffs of the hardship from which they suffer in most ordinary cases of medical malpractice. *Ostojic v. Brueckmann*[14] is a relatively recent decision of the Seventh Circuit United States Court of Appeals to the effect that the Indiana provision will not be circumvented by the use of judicial devices to prolong the time period. Undoubtedly the plaintiff, as a victim of professional negligence, suffered hardship but his inability to recover was inevitable as the result of a clearly expressed legislative intent. Similarly, the Appellate Court of Indiana reached an identical conclusion in *Blank v. Community Hospital*[15] on the same limitation provision.

It is admitted that the application of the limitation period from the time of the accrual of the cause of action may produce harsh consequences to the plaintiff in the cases mentioned above. Nevertheless, it is a result of the application of the canons of interpretation to the statute that time should run continuously from the occurrence of the last element of the tort action in contemplation. This is the ordinary rule applied to limitation statutes and Indiana courts have managed to remain within the rule while attempting to achieve a result more beneficial to the plaintiff in such cases.

It is suggested that a more proper approach might be an amendment of the statute so as to accommodate the difficulty. Hardship to both plaintiff and defendant should be precluded as far as possible. Unlimited mitigation of hardship to a plaintiff must prejudice the defendant to some extent and a balance

14 405 F.2d 302 (7th Cir. 1968). *Compare* Urie v. Thompson 337 U.S. 163 (1949).

15 240 N.E.2d 562 (Ind. App. 1968). A similar result was reached by the Indiana Appellate Court in Meier v. Combs 263 N.E.2d 194 (Ind. App. 1970). In that case the court opined that infants and incompetents alike were bound by the statute without benefit of an extension. This being so, the court was of the opinion that the "professional services" referred to in this statute should be narrowly construed.

between these competing interests must be struck. Since an attempt should be made to achieve justice as between the plaintiff and defendant any attempt to favor one must be at the expense of the interests of the other. It should be borne in mind that hardship may be transferred from the plaintiff to the defendant if the logic of the Indiana decisions were to be extended.

Some statutory modifications of the limitation rules might be considered.[16] Some modifications of the ordinary statutory rule in force in Indiana have been introduced in other jurisdictions. Among the solutions for the hardship in the two cases mentioned above which may be worthy of consideration are:[17]

1. A court competent to hear the case itself might be empowered to extend time in appropriate cases. Such a court might be invested with a discretion to extend the limitation period in a case where the plaintiff would otherwise be out of time and where he had discovered the existence or extent of the injury just prior to his application to the court. The court might then grant an extension of time where it was satisfied that the plaintiff had acted with all due dispatch and diligence.[18]
2. Instead of time beginning to run at the moment of the accrual of a cause of action as it does now in the absence of any specific statutory provision, the limitation period could commence at the time when a plaintiff could be said to recognize that he had a cause of action. Any overt and unambiguous acknowledgment would suffice and it might be accompanied by an affirmation or denial that the plaintiff intended to institute proceedings. To comprehend both circumstances in which a hidden cause of action may occur the statutory section would have to be fairly wide in its terms. No doubt an incubus of judicial decisions on what amounted to a recognition of the cause of action would follow. Such a solution has been instituted in some jurisdictions where a medical practitioner is the defendant in the action and then the limitation period has been allowed to run from the time at which the relationship of doctor and patient was terminated.[19] The difficulty with this as a proposed solution is that it

16 In the English case of Cartledge v. Jopling [1963] A.C. 758, Lord Reid said, "It appears to me to be unreasonable and unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury and, therefore, before it is possible to raise any action. If this were a matter governed by the common law I would hold that a cause of action ought not to be held to accrue until either the injured person has discovered the injury or it would be possible for him to discover it if he took such steps as were reasonable in the circumstances. The common law ought never to produce a wholly unreasonable result, nor ought existing authorities to be read so literally as to produce such a result in circumstances never contemplated when they were decided." *Id.* at 772. Decisions in the United States have resorted to various theories, such as the doctrines of "contract," "continuing negligence," "discovery" and the extended use of "fraudulent concealment" to alleviate this hardship.

17 The following proposals are not intended to be exclusive. Other jurisdictions have attempted other ways of retaining a balance between the interests of plaintiff and defendant.

18 The discretionary extension of time may be a good compromise. Such a system has been in operation in England for some time. *See* Limitation Act (U.K.) 1963, c. 47 and the comments in the ONTARIO LAW REFORM COMMISSIONERS, REPORT 92, 100, 114 (1969).

19 Ohio has in OHIO REV. CODE § 2305.11 (Page's 1954) a statute which allows the

makes liability dependent on the conduct of the plaintiff. That the plaintiff's self-induced mistake or fraud should not extend the period seems clear. Any solution such as this necessarily subordinates the interest of the defendant to that of the plaintiff. Admittedly, the defendant is *ex hypothesi* the wrongdoer but nevertheless he should not be subjected to this element of surprise.

3. A suit might be brought solely to determine liability and the size of the judgment could remain contingent upon the loss suffered. This solution is somewhat similar to the early equitable "suits for the perpetuation of testimony." This solution would clearly only be a solution in those cases in which the plaintiff recognized that he had suffered some damage, for he would not otherwise bring an action. Therefore, this measure would only assist those plaintiffs who had suffered already in those circumstances in which their suffering might be increased. This proposal would also upset the notion that one global award should suffice for compensating the aggrieved individual. However, it may be suggested that in some circumstances this would be no great loss. If, for example, an injury is tortiously inflicted upon a plaintiff and there is a chance that some further damage may eventuate, compensation for this further loss is divided by the chance that it will occur. Thus, if there is a 50 per cent chance of a further $2,000 damage, the award will usually be in the sum of $1,000. This result, it is submitted, is always bound to be wrong. If the extended damage does occur then the plaintiff has been inadequately recompensed by the tortfeasor because he has received only half of his actual damages. If the extended damage does not occur then the tortfeasor has been penalized by having to

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bringing of an action at any time within two years from the termination of the physician-patient relationship. The court is then often faced with determining when the physician-patient relationship terminates. The classic dilemma in this case occurs when the patient makes an appointment within the two year period from the bringing of the action but fails to keep the appointment. In Millbaugh v. Gilmore, 30 Ohio St. 2d 319, 285 N.E.2d 19 (1972) was faced with the question of whether the mere taking of medicine could keep the relationship alive. O'Neill, C. J., stated:

> The record reveals that plaintiff's last contact with Dr. Gilmore occurred on March 27, 1959. Although plaintiff was scheduled to see Dr. Gilmore on April 27, 1959, he did not do so, nor did he see him as a patient thereafter. Thus, by necessary implication the physician-patient relationship here was terminated not later than April 27, 1959. Therefore, the action which was commenced on June 5, 1961, more than two years after termination of the physician-patient relationship, was barred by the provisions of R.C. 2305.11. . . .
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> . . . In view of plaintiff's conduct which terminated the physician-patient relationship, the taking of the medicine prescribed by Dr. Gilmore after that termination did not constitute a continuing course of treatment. The taking of the medicine in such an unsupervised manner neither afforded Dr. Gilmore an opportunity to correct any errors on his part, nor provided a basis for the full treatment contemplated in a physician-patient relationship. Although as plaintiff states in his brief, he was "acting under Dr. Gilmore's advice" in taking the medicine, he was, by his own conduct, no longer Dr. Gilmore's patient at that time.
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> 285 N.E.2d at 21.

See Limitation of Actions Act, REV. STAT. ALBERTA 1970, c. 209 s. 55. This provision may not achieve the desired end because the termination ol the physician-patient relationship may have nothing at all to do with the discovery of the cause of action. Guy v. Schuldt, 236 Ind. 101, 138 N.E.2d 891 (1956). *See also* 34 MO. ANN. STAT. § 516.100 (1952).

pay damages which turned out not to be of a compensatory nature.[20]

However, from the standpoint of limitation of actions this would not be an adequate solution for it operates only in the case of possibly extended damage and not at all in the case of totally unknown damage.

4. The other possible solution to the problem is more general. It would operate on the payment out of a central government fund similar to that in existence for workmen's compensation of an amount designed to compensate for the harm involved.[21] It would be too expensive for a central agency, such as the courts, to establish the relative fault of the parties involved. This would be one way of eliminating the limitation problem but it would also involve an elimination of the concept of fault liability and the tort of negligence in its application to personal injuries. Whether this solution will be acceptable depends upon its political reception. This may be felt to be a rather sweeping reform when viewed in the context of the mitigation of a hardship resulting from the operation of the limitation period. The only justification for the introduction of the scheme in this context is that it may be said incidentally to accomplish a number of other legal reforms.

Therefore, it is recommended that there ought to be some statutory amendment so as to alleviate hardship without imposing a corresponding hardship on defendants. There are several alternatives and of these the possibilities of enacting that the limitation period should begin to run from the time of discovery or that the court should have the power to waive the lapse of time appear to be the most eligible moderate alternatives. Either alternative might result in subjecting a defendant to the possibility of suit for an unreasonably long period. Supplanting all notions of fault with a compensation scheme would eradicate the problem but it would introduce major changes in the law which may be unacceptable to many.

20 This is essentially a scheme establishing "open-end" judgments.

21 Schemes like this have long been advocated. *See e.g.*, T. G. Ison, The Forensic Lottery (1967).